Giddings & Lewis, Inc. *and* District 10 and Lodge No. 1402, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 30-CA-4990

April 8, 1981

DECISION AND ORDER

On November 6, 1979, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a brief, and Respondent filed a brief in response to the exceptions.

The Board has considered the record and the attached Decision in light of the parties' exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Contrary to the Administrative Law Judge, we find that Respondent, by promulgating certain seniority provisions, adversely affecting the job rights of unrecalled economic strikers, violated Section 8(a)(1) and (3) of the Act.

A. *Facts*

On October 1, 1975, following the expiration of the contract and in support of the Union's bargaining demands, Respondent's employees began a strike which lasted until November 20, 1976. As of September 30, 1975, 706 unit employees were working and 108 employees were in layoff status. During the strike, some of the striking employees returned to work and for others permanent replacements were hired. As of November 20, 1976, Respondent employed 323 replacements. At the conclusion of the strike, Respondent told the Union and the striking employees that it would not be able to reinstate all the returning strikers, but that it would set up a preferential hiring list for those who had been permanently replaced. This recall procedure was established and is not alleged to be unlawful. Initially, there were approximately 700 employees on the list. In October 1978, Respondent promulgated certain seniority rules which provide in pertinent part:

> Job classification seniority shall apply in the event of layoff due to lack of work in the division in the following manner . . . . Recall to work shall be made in reverse order of layoff whereby an employee laid off from a job classification shall be offered recall to that job classification prior to other employees being assigned, rehired from the preferential hiring list or new employees hired.
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> Selection of an employee to fill an available job opening, where there is no employee currently on layoff (a layoff which commenced after September 30, 1975) from the job classification, shall be made considering the relative qualifications or the ability to perform the work with a reasonable period of training and seniority. Where the qualifications or abilities of employees are deemed relatively equal by the Company, seniority shall prevail. Consideration shall first be given to employees working in another job classification in the division; and, second, to employees on layoff from the division. If the job opening remains unfilled, the preferential hiring list procedure shall be utilized prior to hiring a new employee.
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> All seniority rights shall be lost when an employee . . . is laid off for a continuous period equal to the length of time actively employed prior to such layoff period.

On April 16, 1979, following a Board-conducted election (Case 3-RD-388), the Union was decertified as bargaining representative. At the time of the hearing, Respondent's work force numbered 508 employees of which 229 were replacements, 21 were strikers who returned to work before the end of the strike, and 258 were reinstated strikers. The number of employees on the preferential hiring list was 176.

B. *Contentions of the Parties and the Administrative Law Judge's Findings*

The General Counsel and the Charging Party contend that Respondent's seniority preference to replacement employees for job-bidding purposes is an illegal grant of superseniority and that the seniority preference for job vacancies afforded to replacement employees who had been laid off over unreinstated strikers is an illegal grant of superseniority. They asserted that the recall procedure set forth above is inherently destructive of employee rights within the meaning of *N.L.R.B.* v. *Erie Resistor Corp. et al.*, 373 U.S. 221 (1963), and *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), and thus proscribed by Section 8(a)(1) and (3) of the Act.

Respondent contends that its seniority policy is lawful because unreinstated strikers have the right to be reinstated only before a new employee is hired; they do not have a right to reinstatement before a replacement on layoff is recalled. It further argues that there are legitimate and substantial

business reasons for recalling laid-off replacements before unreinstated strikers.[1]

The Administrative Law Judge dismissed the complaint, relying upon *Bancroft Cap Company*, 245 NLRB 547 (1979), which he interpreted to hold that unreinstated strikers do not have a statutory right of recall ahead of laid-off replacements who have a reasonable expectation of recall. The Administrative Law Judge found that Respondent's present policy expressly excludes from recall rights employees who, under Respondent's standards for such determination, do not have a reasonable expectation of recall. He therefore concluded, without reaching Respondent's alternative contention that its policy is justified by legitimate and substantial business reasons, that the stated recall policy is not unlawful on its face. For the reasons set forth below, we reject the Administrative Law Judge's reasoning, and find that Respondent's recall policy favoring laid-off employees over unreinstated strikers constitutes an illegal grant of superseniority.

C. *Discussion*

The right of economic strikers to be treated fairly with nonstrikers and replacements has been well established. In *Fleetwood Trailer*,[2] the Supreme Court held:

> . . . the status of the striker as an employer continues until he has obtained "other regular and substantially equivalent employment." . . . If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justifications." *N.L.R.B.* v. *Great Dane Trailers* [388 U.S. at 34].

The Court found there was no need to prove antiunion motivation when the employer failed to hire strikers when new jobs were subsequently established. In *Great Dane*, the employer refused to pay strikers vacation benefits while at the same time announcing that it intended to pay those benefits to nonstrikers. The Court held that the act was "discrimination in its simplest form," noting that "[t]he act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity." 388 U.S. at 32.

Similarly, in *Erie Resistor*,[3] the Court concluded that the Board was entitled to view an employer's grant of superseniority to strike replacements and to strikers who abandoned the strike as conduct so destructive of employee rights that it carried its "own indicia of intent" and was "barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights."[4]

In its Decision in *The Laidlaw Corporation*,[5] the Board, relying on the principles set forth in *Fleetwood Trailer, Great Dane*, and *Erie Resistor*, held that economic strikers who unconditionally apply for reinstatement when their positions are filled by permanent replacements are entitled to full reinstatement upon the departure of replacements or when jobs for which they are qualified become available, unless they have in the meantime acquired regular and substantially equivalent employment or the employer can sustain its burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

As previously stated, Respondent contends that *Laidlaw* and the various Supreme Court cases relied on therein do not control the instant situation. Respondent maintains that an unreinstated striker has the right to be reinstated only before a new employee is hired and that he does not have the right of reinstatement before a laid-off replacement is recalled. Second, assuming, *arguendo*, that there is a general requirement to reinstate from the preferential hiring list before recalling laid-off replacements, Respondent maintains that the general requirement must give way in this case because here there are legitimate and substantial business reasons for the recall of replacements.

Laidlaw has been interpreted and applied far more broadly than Respondent suggests. In *Transport Company of Texas*,[6] the employer recalled economic strikers, but subsequently laid off four former strikers while retaining the replacements and nonstrikers. The administrative law judge, with Board approval, analyzed *Fleetwood Trailer, Great Dane, Erie Resistor*, and *Laidlaw*, and stated that "reinstated economic strikers who were once replaced, but recalled when vacancies occur or other

[1] We find merit in Respondent's contention in its answering brief to the exceptions that the issue of job-bidding procedures favoring *currently working employees* was not alleged in the complaint and was not litigated. We therefore make no findings regarding that particular issue. However, contrary to Respondent's assertion, we find that the issue of Respondent's job-bidding procedures favoring laid-off employees (when filling vacancies unrelated to layoffs) was alleged in the complaint and was fully litigated. In this regard, we note that the issue was discussed both during the hearing and in the post-hearing briefs submitted by the General Counsel and Respondent.

[2] *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 381 (1967).

[3] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221.

[4] *Id.* at 231.

[5] 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[6] 177 NLRB 180 (1969).

business conditions warrant it, are not to be treated as newly hired employees but must be treated 'uniformly with non-strikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship.'"[7] The administrative law judge concluded that the strikers were not given the "full and complete" reinstatement due them because they were placed in a subordinate class distinguished only by the exercise of their statutory rights, that such conduct is inherently destructive of employees' rights, and that the respondent had shown no business justification for selecting the former strikers for layoff.

In *Brooks Research and Manufacturing, Inc.*,[8] the employer unilaterally terminated the recall rights of former strikers, relying in part on the passage of time. The employer contended that a 1-year rule commencing from the end of the strike (rather than from the beginning of the strike as with voter eligibility) would be reasonable and appropriate. The Board rejected the employer's attempt to equate the rights of economic strikers with those of laid-off employees. The Board stated that "[t]he reinstatement rights of economic strikers under *Fleetwood Trailer* and *Laidlaw* are statutory as distinguished from rights of laid-off employees. A layoff constitutes a discontinuance of work for an employer which does not rise to the level of a lawful economic strike, participation in which is protected under Section[s] 7 and 13 of the Act."[9]

Wisconsin Packing Company[10] involved issues similar to those in the instant case. There, the Board rejected the employer's contention that it was privileged to recall laid-off employees and to transfer employees from other departments without regard to the recall rights of unreinstated strikers. The administrative law judge, with Board approval, carefully analyzed the relevant Supreme Court cases, *Laidlaw* and its progeny, and reaffirmed the by then well-established principle that unreinstated strikers who have unconditionally applied to return to work have maintained their employment status and are entitled to be treated fairly and uniformly with the nonstrikers with respect to seniority and other benefits of the employment relationship. In that case, the employer violated its own seniority policies by recalling and transferring employees of less seniority to jobs which the discriminatees were able to perform, thus stricturing the strikers' employment status by depriving them of their accrued seniority—in effect granting striker replacements superseniority. The Board found that the employer's conduct was tantamount to that proscribed in *Erie Resistor*. The employer's conduct was considered the equivalent of that found violative in *Transport Company of Texas*, where the employer recalled the economic strikers, but, in a subsequent reduction in force, selected the strikers for layoff while retaining nonstrikers and replacements. As previously stated, the employer in *Transport Company of Texas* violated the Act because the selection of strikers for layoff placed them in a subordinate status solely because they had engaged in a strike.

Notwithstanding this long line of cases, the Administrative Law Judge dismissed the complaint on the basis that *Bancroft Cap Company*, 245 NLRB 547, is dispositive of the issues herein. The Administrative Law Judge interpreted *Bancroft* as holding that unreinstated strikers do not have a statutory right of recall ahead of laid-off replacements who have a reasonable expectation of recall. He concluded that Respondent's present policy "expressly excludes from recall rights employees who, under the *Company's standards for such determination*, do not have a reasonable expectation of recall." (Emphasis supplied.) The Administrative Law Judge failed to note that, in *Bancroft*, the Board specifically qualified the Administrative Law Judge's analysis, and relied particularly on the fact that the layoffs involved therein were for periods of only 2 to 7 days and were due to shortages of materials. Thus, on the facts of that case, the Board found that there were no vacancies which the respondent was obligated to offer unreinstated strikers.

Therefore, contrary to the Administrative Law Judge, *Bancroft* does not permit an employer to escape its *Laidlaw* obligation by merely stating that laid-off employees have a reasonable expectancy of recall. Indeed, in the instant case, the General Counsel has specifically denied that it is seeking recall of unreinstated strikers after layoffs of relatively short duration such as would result from acts of God, brief parts or materials shortages, or relatively short-term loss of business. We agree that an employer should not have to disrupt its existing work force in such circumstances. However, Respondent's stated policy gives recall preference to laid-off employees over unreinstated strikers regardless of the length or the cause of the layoff.[11]

We see no real difference between Respondent's treatment of unreinstated strikers and the employ-

[7] *Id.* at 185.
[8] 202 NLRB 634 (1973).
[9] *Id.* at 636.
[10] 231 NLRB 546 (1977).

[11] Contrary to the Administrative Law Judge's finding, Respondent's rule that seniority rights shall be lost when an employee "is laid off for a continuous period equal to the length of time actively employed prior to such layoff" is not a valid standard for determining whether a job vacancy exists. Indeed, a replacement who is on layoff status for several years could, under Respondent's standards, be given preference for recall. This is hardly the type of situation envisioned in *Bancroft*.

er's treatment of the former strikers chosen for layoff in *Transport Company of Texas*. Both actions amount to a grant of superseniority to replacements as prohibited in *Erie Resistor*, or treating strikers as new employees as the employer did in *Laidlaw*. We are not holding that Respondent was required to give preference to strikers or to place nonstrikers and replacements in a subordinate position with respect to recall rights. Certainly, Respondent could have considered many factors unrelated to concerted activity. Instead it chose to establish certain classifications of employees, classified unreinstated strikers on the basis of their protected activity, and proposed to treat them less favorably solely because they had been engaged in a strike. Respondent, in effect, has set up two unequal classes of employees with respect to recall rights, separated only on the basis of whether or not they participated in a strike. Thus, the seniority rights of the employees involved were established on the basis of invidious considerations, and Respondent's policy is unlawful on its face under well-established precedent.

Since we have determined that Respondent's seniority policy is inherently discriminatory, we turn next to Respondent's alternative contention that its policy is justified by "legitimate and substantial business reasons." Respondent asserts that many of its jobs require a high degree of skill and experience and that no unreinstated striker has performed any of those jobs since October 1, 1975, when the strike began. Respondent contends that to require it to reinstate strikers rather than recall replacements in the event of future layoffs would be to impinge drastically upon its cost efficiency and to place in jeopardy its reputation for timely performance. Respondent stresses that, in the event of a total shutdown caused by a natural disaster, the current work force would be disassembled instead of preserved, and there would be a significant delay in reestablishing operations.

Respondent's contention is rejected. As previously stated, *Laidlaw* does not require an employer to disrupt his existing work force in the event of a temporary layoff where there are no true vacancies. Respondent's policy is not limited to this type of situation, but rather, as we have seen, gives recall preference to laid-off nonstrikers and replacements in almost every situation regardless of the circumstances of the layoff. As for Respondent's general contention that the unreinstated strikers are no longer qualified or are less qualified to perform the work, this argument is similarly rejected. The Supreme Court pointed out in *Fleetwood Trailer* that "the burden of proving justification is on the employer." 389 U.S. at 378. Here, Respondent's defense amounts to no more than speculation, and is particularly suspect in view of the General Counsel's statement that Respondent has no obligation to reinstate strikers to jobs for which they are not, nor could they readily become, qualified. Furthermore, Respondent's seniority policy applies to all jobs, some of which admittedly would require little or no training for unreinstated strikers.

We have found that Respondent's policy of recalling laid-off employees ahead of unreinstated strikers without regard to the circumstances involved amounts to an unlawful grant of superseniority to nonstrikers and replacements in violation of Section 8(a)(1) and (3) of the Act. We have further found that Respondent has advanced no legitimate business justification in support of its policy. The principles set forth above also govern that part of Respondent's policy which gives preference to laid-off employees over unreinstated strikers in the filling of job vacancies unrelated to the layoffs where the qualifications or abilities of employees are deemed relatively equal by the Company. Such policy is clearly inherently discriminatory and violative of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully promulgating and maintaining seniority provisions which discriminate against unreinstated strikers, we shall order Respondent to discontinue the unlawful policy. Further, we shall order that the reinstatement rights of the unreinstated strikers continue in accordance with the applicable principles of law set forth in *Fleetwood, Laidlaw*, and the instant Decision.[12]

CONCLUSIONS OF LAW

1. Giddings & Lewis, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 10 and Lodge No. 1402, International Association of Machinists and Aerospace Workers, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By promulgating and maintaining seniority provisions which discriminate against unreinstated strikers in the filling of all postlayoff vacancies as well as in the filling of job vacancies which do not

[12] There is no allegation that any specific individuals have been deprived of reinstatement because of Respondent's unlawful policy.

result from layoffs, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices which affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Giddings & Lewis, Inc., Fond du Lac, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promulgating and maintaining seniority provisions which discriminatorily interfere with the preferential recall rights of unreinstated strikers.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Recall unreinstated strikers in a nondiscriminatory manner.

(b) Post at its plant in Fond du Lac, Wisconsin, copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT promulgate or maintain seniority provisions which discriminatorily interfere with the preferential recall rights of unreinstated strikers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of Act.

WE WILL recall unreinstated strikers in a nondiscriminatory manner.

GIDDINGS & LEWIS, INC.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: This case was heard at Fond du Lac, Wisconsin, on June 4 and 5, 1979. The charge and amended charges were filed, respectively, on November 27, December 4 and 28, 1978, and January 8, 1979, by District 10 and Lodge No. 1402, International Association of Machinists and Aerospace Workers, AFL-CIO (herein the Union). The complaint, which issued on January 19, 1979, alleges that Giddings and Lewis, Inc. (herein the Company or Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The gravamen of the complaint is that the Company promulgated and has maintained rules regarding job vacancies in the event of layoffs which, by their terms, allegedly interfere with the preferential hiring rights of the Company's unreinstated strikers. The Company's answer denies that the Company violated the Act. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and Respondent each filed a brief.

Upon the entire record in this case[1] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a Wisconsin corporation with its headquarters at Fond du Lac, Wisconsin, operates plants at Fond du Lac, where it is engaged in the manufacture of machine tools. In the operation of its business, the Company annually ships products valued in excess of $50,000 from its Fond du Lac plants directly to points located

[1] Errors in the transcript have been noted and corrected.

outside the State of Wisconsin. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and the Alleged Unlawful Rules*

The Company's Fond du Lac operations comprise three divisions: Giddings and Lewis Machine Tool Co. (herein Machine Tool); Davis Tool Co. (herein Davis); and Giddings and Lewis Electronics Co. (herein Electronics). For some 40 years, the Union was the collective-bargaining representative of the Company's Fond du Lac employees in a single unit, and the Company and the Union were parties to a series of collective-bargaining contracts covering those employees. On October 1, 1975, following the expiration of the last contract, the Union commenced a strike against the Company which lasted until November 20, 1976. Initially all of the unit employees joined in the strike. As of September 30, 1975, 706 unit employees were working and 108 employees were in layoff status. For several months, the Company functioned on a curtailed basis, using salaried employees and management personnel to perform unit work. On April 26, 1976, after giving notice to the striking employees, the Company began hiring permanent replacements. As of November 20, 1976, the Company employed 323 replacements. Concurrently with the end of the strike, the Union made an unconditional offer to return to work on behalf of all the strikers. In a subsequent unfair labor practice proceeding (*Giddings & Lewis, Inc.*, 240 NLRB 441), decided January 30, 1979, the Board held, in sum, that the strike was economic and not, as originally alleged by the General Counsel, converted into an unfair labor practice strike or prolonged by any employer unfair labor practice. The Board also resolved allegations that the Company discriminatorily terminated certain strikers, discriminatorily refused to recall certain strikers, and placed certain others on the post-strike preferential hiring list. The Company contended that the discharges were for picket line misconduct. The Administrative Law Judge found, in sum, that some of the discharges did not engage in conduct which was sufficiently serious to warrant their termination and, therefore, that they were unlawfully discharged. The Administrative Law Judge recommended that the remaining allegations of the complaint be dismissed. Subsequently, the parties entered into a stipulation which was approved by the Board in its Decision, by which the Company agreed to remedy the conduct found unlawful by the Administrative Law Judge. Except for the finding that the strike was an economic strike, which provides the basis for defining the rights of unreinstated strikers, the Board's Decision has no bearing on the issues presented in the present case. On April 16, 1979, following a Board-conducted election (Case 30-RD-388), the Union was decertified as bargaining representative.

The Company established a preferential hiring list for unreinstated strikers. By internal memoranda dated December 17, 1976, and January 13, 1977, the Company established a procedure for the recall of unreinstated strikers to fill job openings. The Company has adhered to that procedure, and the General Counsel does not contend that the procedure is unlawful. Initially there were about 700 employees on the list. As of June 1, 1979, a total of 176 employees remained on the list, the attrition having been variously caused by death, retirement, reinstatement, and refusal of reinstatement. As of June 1, 1979, the Company had a work force of 509 employees, which consisted of 229 permanent replacements, 21 strikers who returned to work before the end of the strike, and 258 reinstated strikers. No replacements were hired after November 20, 1976, and no replacements were terminated to make room for strikers. Company vice president for industrial relations, Charles Zwerg, testified, in sum, and without contradiction, that by reason of several economic and administrative factors, the Company anticipated maintaining its work force at approximately that level; i.e., at a level which was substantially below the size of the work force immediately prior to the strike. The Company did not anticipate economic or other layoffs in the near future. However, in anticipation of the possibility of layoffs for lack of work at some time in the future, the Company, in October 1978, promulgated certain statements of policy pertaining to recall of employees in the event of layoff. These statements are contained in the section captioned "Seniority" of handbooks for hourly rated employees which were issued for employees at Machine Tool, Davis, and Electronics respectively. The seniority provision, which is identical for each of the three Divisions, is here quoted in full, and the sections which the General Counsel contends are unlawful are underscored:

> A separate seniority roster for each operating division, the Giddings & Lewis Machine Tool Company, The Davis Tool Company, and the Giddings & Lewis Electronics Company shall prevail. Divisional seniority shall be computed from the date of most recent hire of continuous service or transfer to the plant hourly workforce. The divisional seniority of an employee who is returned to work from the preferential hiring list shall only be in the division to which he or she is returned. Salaried employees who previously worked in the plant hourly workforce shall continue to hold and accumulate divisional seniority during the period of salaried employment. When two or more employees begin work on the same day, regardless of shift assigned, the employee whose application bears the earlier date and time of acceptance of employment shall be considered the senior employee.
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> An employee shall be initially assigned to the shift where the job opening exists and may not exercise divisional seniority to displace another employee for choice of shift. A switch of shift assignment shall be permitted only by mutual arrangement with the employee's partner and supervisor. However, such shift arrangement shall revert back to the

original shift assignment if either of the employees requests to dissolve the agreement, and such request is approved by the supervisor. Following assignment to a particular job classification an employee may exercise his or her divisional seniority for shift preference purposes when an opening in that job classification becomes available. When such opening develops, before it is filled, the choice of shift will be offered to employees already assigned and currently employed in the job classification in divisional seniority order. Employees recalled from layoff to the job classification will be offered the shift that is available at the time of recall to work. Where training is involved and such training can be done effectively only on one specific shift, supervision may require the senior employee working opposite the trainee, for the training period, to work on a shift other than the one normally assigned.

Within each division, seniority rights by job classification shall prevail. The initial job classification seniority date for an employee is the date of assignment to the job classification in which the employee has satisfactorily completed sixty-five (65) working days as determined by the employee's supervisor.

Establishment of job classification seniority in a subsequent job shall be the date of assignment in which the employee has satisfactorily completed forty-five (45) working days as determined by the employee's supervisor. (An employee rehired from the preferential hiring list shall have active and inactive job classification seniority previously established but the seniority shall be applied only at the division to which the employee is rehired. Inactive seniority accrues only from those jobs where the employee had actually been assigned and had satisfactorily completed the required or probationary trial period.)

An employee permanently transferred to a different job classification shall continue to hold inactive job classification seniority rights established on former jobs within the division where the employee has satisfactorily completed forty-five (45) working days. It is necessary on occasion, for supervision to temporarily assign an employee to perform work outside of that employee's job classification for periods of short duration (generally less than 45 consecutive working days). Employees temporarily assigned shall continue to accrue seniority in their normal job classification and not in the temporarily assigned job. An employee in the hourly workforce who transfers to the salaried workforce shall continue to hold and accumulate job classification seniority rights during the period of salaried employment. Where two or more employees are transferred to the same job on the same day, regardless of shift assigned, the employee having the greater length of divisional seniority shall be considered the senior employee.

Job classification seniority shall apply in the event of layoff due to lack of work in the division in the following manner. An employee laid off due to lack of work from the present assigned job classification shall revert to former job classifications in the division with lower point ratings in which the employee has established inactive job classification seniority rights. These seniority rights shall be applied beginning with the job of higher point value to the job of lower point value. *Recall to work shall be made in reverse order of layoff whereby an employee laid off from a job classification shall be offered recall to that job classification prior to other employees being assigned, rehired from the preferential hiring list or new employees hired.*

Selection of an employee to fill an available job opening, where there is no employee currently on layoff (*a layoff which commenced after September 30, 1975*) from the job classification, shall be made considering the relative qualifications or the ability to perform the work with a reasonable period of training and seniority. Where the qualifications or abilities of employees are deemed relatively equal by the Company, seniority shall prevail. *Consideration shall* first *be given* to employees working in another job classification in the division; and, *second, to employees on layoff from the division. If the job opening remains unfilled, the preferential hiring list procedure shall be utilized prior to hiring a new employee.*

Job classification seniority shall be lost when an employee is unable to satisfactorily perform the required job duties as determined by the employee's supervisor or when an employee declines assignment to a job classification where that employee previously established seniority. An employee may be transferred to a lower rated job for health, safety, or some other compelling reason.

If the compelling reason still exists after one (1) year, the matter will be thoroughly reviewed and if it is determined by the supervisor that there is no reasonable expectation of the employee being able to return to the prior job, the employee will forfeit seniority rights in that job.

All seniority rights shall be lost when an employee—

(1) voluntarily quits
(2) is discharged
(3) is absent for five consecutive work days without proper notification to the Company
(4) fails to advise the Company within four (4) working days after the date he is mailed a certified letter of notification to report to work, when recalled from layoff
(5) is laid off for a continuous period equal to the length of time actively employed prior to such layoff period.

B. *Discussion and Concluding Findings*

The General Counsel contends that the Company's recall procedure is *per se* unlawful because it provides for recall of laid-off replacement employees before unreinstated strikers. The General Counsel's position is succinctly stated in his brief: "Noting that Respondent defines a layoff as one which commenced after September

30, 1975, i.e., after the strike began, the General Counsel contends that recalling replacement employees who are laid off prior to returning unreinstated strikers to work is in effect an illegal grant of superseniority to the replacements." The Company contends that the policy is lawful because unreinstated strikers do not have a right to reinstatement before a replacement on layoff is recalled, and that, in any event, the Company has legitimate and substantial business reasons for recalling laid-off replacements before unreinstated strikers.

Subsequent to the filing of briefs in this case, the Board issued its Decision in *Bancroft Cap Company*, 245 NLRB 547 (1979), in which it held, in sum, that unreinstated strikers do not have a statutory right of recall ahead of laid-off replacements who have a reasonable expectation of recall. That Decision is dispositive of the General Counsel's present contention and, consequently, of the present complaint. The principal case authorities relied upon by the General Counsel and the Company in the present case, including *Wisconsin Packing Company*, 231 NLRB 546 (1977), upon which the General Counsel principally relies, are discussed and analyzed in *Bancroft*, and that discussion need not be repeated here. The Company's present policy expressly excludes from recall rights employees who, under the Company's standards for such determination, do not have a reasonable expectation of recall. It is possible that, in some future situation, a question might arise as to whether a particular employee or employees on layoff have a reasonable expectancy of recall. However, such question is not before me. Rather, the sole question, in essence, is whether the Company's stated policy is unlawful on its face. I find, on the authority of *Bancroft, supra*, that it is not. Therefore, the complaint should be dismissed.[2]

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Company has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

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[2] Therefore also, it is unnecessary to pass on the Company's alternative contention that its policy is justified by "legitimate and substantial business reasons." *The Laidlaw Corporation*, 171 NLRB 1366, 1369–70 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). It is sufficient to find, as I do, that the General Counsel has neither alleged nor proven that the Company's policy is discriminatorily motivated.